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IN THE

Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

On appeal from the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CONGRESSMEN BARNEY FRANK AND CHRISTOPHER SHAYS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Pursuing the "principle that 'legislators ought . . . generally to be bound by [the law] as are ordinary persons,'" *Davis v. Passman*, 442 U.S. 228, 246 (1979) (internal citation omitted; alterations in original), the Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. §§ 1301-1438, makes twelve federal statutes establishing workplace rights and protections applicable to the Legislative Branch of the United States. The theory is that "Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch." 141 Cong. Rec. H90-02, H94 (daily ed. Jan. 4, 1995) (statement of Rep. Shays). *Accord* 141 Cong. Rec. S452 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman) ("[T]he CAA is saying let us do unto ourselves as we have done unto others.").

Congressman Barney Frank is a Democrat representing Massachusetts's Fourth District. Congressman Christopher Shays is a Republican representing Connecticut's Fourth District. Like Senator Dayton, Congressmen Frank and Shays benefit from, and strongly care about, the protections provided by the Speech or Debate Clause. But Congressman Shays was one of the primary sponsors of CAA legislation. Both he and Congressman Frank worked vigorously for the CAA's passage in 1995, and have strongly supported its effective enforcement. Amici wish to provide the Court with the view of concerned legislators on the issues presented.

Amici take no position on the merits of Hanson's complaint against the Office of Senator Mark Dayton ("the Employing Office" or "appellant"). But, Amici oppose the Employing

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[1] Pursuant to Supreme Court Rule 37.6, Amici state that no counsel for a party authored this brief in whole or in part, and no person or entity other than Amici has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Office's assertions (i) that a CAA claim is mooted or automatically abated when a Member's term of office expires (*see* Br. 16-22; Suggestion of Mootness 1), and (ii) that the Speech or Debate Clause requires dismissal of CAA claims where the plaintiff's "job duties [a]re part of the due functioning of the legislative process." Juris. Statement 7; *see also* Br. 23-47.

As demonstrated below, the Employing Office's arguments are wrong and misunderstand both constitutional doctrine and the CAA. Congress purposefully designed the CAA to avoid potential mootness and immunity issues in a constitutional manner. Any contrary holding would emasculate the CAA and frustrate its purpose—to improve our democratic government by subjecting Members of Congress to the same legal burdens that they impose on the private sector and Executive Branch.

SUMMARY OF ARGUMENT

The CAA was carefully designed to require Congress to live by laws it imposes on others, while protecting the independence and speech and debate immunities of its Members. Under the CAA, individual Members of Congress are not subject to suit or damage awards. Rather, potential plaintiffs must commence proceedings against a federally-created entity known as the "employing office" that is charged with executing personnel decisions; damages are recoverable and expenses are paid only from an independent account maintained by the Department of the Treasury; and an independent nonpartisan office within the Legislative Branch administers and enforces the Act.

In light of the CAA's design, actions under it are not mooted, or alternatively abated, by the expiration of a Member's term of office. Indeed, the continued holding of office neither is necessary to the continued legal existence of the "employing office" nor is required to recover damages from the U.S. Treasury. In addition, as the briefing in this

case amply demonstrates, defense counsel in a CAA action is not hired by, nor representing, individual Members of Congress but the entity known as the "employing office" and will continue to represent an employing office even after a Member's term expires. Thus, this case presents a live controversy, hotly contested by interested parties and advocates.

These same attributes of the CAA avoid the Speech or Debate Clause infirmities that the Employing Office erroneously asserts here. Under this Court's well-established precedent, the Speech or Debate Clause applies only to "legislative acts" of Members or their aides, such as acts of voting, statements made during committee proceedings, issuance of congressional subpoenas and the like. It does not apply to acts that are not themselves aspects of the legislative process, even if those acts are performed by the Member (or an aide) in an official capacity, and even if the acts have some nexus to legislative functions. And, where applicable, the immunity of the Clause runs only to Members and their aides; it does not run to other Legislative Branch officials or entities who carry out or implement legislative acts.

The actions covered by the CAA—personnel actions of an "employing office"—are not "legislative acts" of a Member or an aide. While employment actions facilitate the legislative process, they are not part of it; rather, they are part of the process of administering and managing a congressional office. The pertinent case law confirms this conclusion. In *Forrester v. White*, 484 U.S. 219 (1988), this Court held that personnel actions of judges are "administrative acts," and thus not subject to analogous common law immunities even where the administrative act is "essential" to "the very functioning of the courts." *Id.* at 228.

Appellant's contrary argument, that the Speech or Debate Clause bars judicial scrutiny of personnel decisions concerning employees whose duties are "directly related to the due functioning of the legislative process," is based on an

overly-broad reading of the Clause that is not supported by this Court's jurisprudence. Appellant's reliance on the Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), is misplaced given the distinct design of the CAA and certain unique aspects of the institution of the Presidency.

In addition, appellant wrongly argues that the Speech or Debate Clause requires dismissal of this action to prevent *inquiry* into legislative acts—an argument that seeks both to expand the scope of the Clause's testimonial privilege and to convert it into an immunity of its own force. The lower court's consideration of this issue was premature given that no testimonial privilege has yet been asserted. In any event, this Court's jurisprudence makes clear that the Clause's testimonial privilege merely protects Members from having to testify involuntarily about a legislative act. It does not require the outright dismissal of a suit that does not allege the illegality of a legislative act, and does not prohibit a Member from voluntarily providing a defense to an action and being cross-examined about that defense.

Any doubt about the CAA's constitutionality should be resolved in favor of the CAA and against the invocation of immunity. Like all federal statutes, the CAA is entitled to a strong presumption of constitutionality. Here, that presumption is particularly deserved, since Congress has thoroughly evaluated and decided the precise constitutional questions in issue. This Court should not abate a lawsuit that Congress thought should survive; and the Court should not force upon Congress an immunity that Congress itself did not believe necessary to protect its independence.

ARGUMENT

I. THIS CASE PRESENTS A LIVE CONTROVERSY AGAINST A PROPER PARTY.

In its order of January 19, 2007, this Court directed the parties to brief, among others, the question "was this case

rendered moot by the expiration of the term of office of Senator Dayton?" In response, the Employing Office (Br. 16-22) has asserted that the action no longer presents a justiciable controversy because it has been abated—an affirmative defense that arises when there is no longer a proper party capable of pursing a suit. Contrary to the Employing Office's suggestion, mootness and abatement are separate legal doctrines. *See, e.g., Int'l Union, UAW v. Telex Computer Prods., Inc.*, 816 F.2d 519, 521-22 (10th Cir. 1987); *Nat'l Treasury Employees Union v. Campbell*, 654 F.2d 784, 787 (D.C. Cir. 1981) (criticizing party for confusing mootness with abatement). Moreover, under both principles of mootness and principles of abatement, this case continues to present a live controversy against a proper party.

A. CAA Actions Are Not Mooted By The Expiration Of A Member's Term.

The CAA's structure and purposeful design demonstrate that an action is not mooted by the expiration of the term of a Member. The lawsuit against the Employing Office rendering the employment decision at issue remains live and contested.

Under this Court's precedent, the burden of demonstrating mootness "is a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). "[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal quotation marks omitted). Thus, in *Powell v. McCormack*, 395 U.S. 486, 496-99 (1969), this Court held that an action challenging the exclusion of a member-select from his congressional seat was not mooted by the expiration of the session of Congress and the plaintiff's being seated in a subsequent session because the Representative's interest in back pay was "still unresolved and hotly contested by clearly adverse parties."

Plainly, here, a live controversy between adverse parties exists. Under the CAA, the defendant is *not* the Member of Congress, but a legal entity termed the "employing office" that is charged with executing personnel decisions and serving as a defendant in suits. 2 U.S.C. §§ 1301(9), 1405(a), 1408(b). Nothing in the text or structure of the CAA makes the legal existence of the "employing office" depend on a Member's continued term of office. The *only* limit vis-à-vis the employing office is that actions against it must be asserted within statutorily specified time periods. *See id.* §§ 1402-1404. Reading into the statute the additional limit that the Member must occupy the office lacks any proper legal basis. *See, e.g., Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

In addition, there is still an available remedy, because damage awards and settlements are not funded by the Member's personal office funds but by an independent account maintained by the Department of the Treasury. 2 U.S.C. § 1415(a). Appropriations under this account do not depend on a Member's continued term of office; the CAA expressly authorizes appropriation of "such sums as may be necessary for administrative, personnel, and similar expenses of employing offices which are needed to comply with [the Act]." *Id.* § 1415(b). Thus, even though the term of the Member has expired, the plaintiff still has an interest in a damage awarded against an adverse party, the Employing Office itself.

The U.S. Senate Handbook confirms this understanding. It recognizes that actions under the CAA are brought against an entity called the employing office, not against individual legislators. *See* Senate Comm. on Rules and Administration, U.S. Senate Handbook I-8 to I-11 (1996). In addition, the Office of Senate Chief Counsel for Employment is tasked with defending employing offices of Senators, *id.* at I-23, and nothing in the Handbook suggests that this representation depends on the continuation of the Senator's term. The

Handbook also confirms that any judgments will be satisfied "from funds appropriated . . . for that purpose," not by "[i]ndividuals [or] Senate offices." *See id.* at I-11. It further provides for the payment of all "expenses incurred up to and including the Senator's last day of service." *Id.* at I-95 (Br. 10a). This provision naturally allows for the payment of back pay, the obligation for which is incurred during the Member's term.

Thus, despite Senator Dayton's departure from office, the Employing Office still exists as a legal entity that made an employment decision and is capable of being sued; a damages remedy can still be obtained from the U.S. Treasury; and, the Employing Office can continue to enjoy zealous representation. The case is not moot.

B. Alternatively, CAA Actions Are Not Abated By The Expiration Of A Member's Term.

Despite Hanson's clear continuing interest in a damages award, the Employing Office argues that the expiration of Senator Dayton's term of office has caused this action to abate automatically, such that it must be dismissed absent an express clause saving the action. This alternative argument is legally and factually erroneous.

As a matter of law, this Court has held that "[w]here a plea in abatement is relied upon, the burden of proof rests upon the defendant" to demonstrate abatement. *De Sobry v. Nicholson*, 70 U.S. 420, 423 (1865). In addition, the Court has recognized that abatement is automatic—and thus an action saved only by an express savings provision—in only two instances: when an individual defendant dies, *see List v. Pennsylvania*, 131 U.S. 396 (1888), or when a corporate defendant is fully dissolved under the relevant state or federal law, *see Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631 (1949). Where something short of death, either the physical kind or the formal kind occasioned by the operation of law, has occurred, this Court has held that

abatement is *not* automatic, and that the action should be maintained unless the defendant satisfies the burden of proving that Congress intended the action to abate. Thus, in *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 272-73 (1959), the Court held that no automatic abatement had occurred, because under the relevant state law, "the lives of these [defendant] corporations were not cut short, as is sometimes done on dissolution, but were sufficiently continued so that this proceeding did not abate." *Id.* (internal citation omitted). Moreover, the defendants had failed to prove that Congress intended its action to abate on something short of the defendant's complete death. *Id.*

The Employing Office misunderstands these legal principles by assuming that this action automatically abates—and thus requires dismissal absent an express savings clause—without satisfying its initial burden of proving that Congress has statutorily provided for the Employing Office's demise. The Employing Office erroneously relies (Br. 18-19, 21) on cases such as *Defense Supplies Corp.*, 336 U.S. at 637-38, and cases concerning the common law of abatement, where abatement had to be understood as automatic because Congress had *expressly* provided for dissolution of the government corporate defendant, and transferred all of the corporation's assets and liabilities to a successor. *See id.; see also Organic Cow, LLC v. Ctr. for New England Dairy Compact Research*, 335 F.3d 66, 72-73 (2d Cir. 2003) (Congress set expiry date for Commission); *Skolnick v. Parsons*, 397 F.2d 523, 525 (7th Cir. 1968) (Congress expressly terminated Commission). This assumption of automatic abatement is erroneous here, however, because there is no provision dissolving the Employing Office and, indeed, the Judgment Fund continues to be independently responsible for any damages awarded.

As a factual matter, the Employing Office clearly has not been dissolved. As in *Melrose*, here, an employing office remains a legal entity capable of being sued notwithstanding

the expiration of a Member's term of office, because there is *no* provision of law providing for its complete dissolution. Rather, under the Act, the "employing office" includes a host of entities in the Legislative Branch, such as the personal office of a Senator, 2 U.S.C. § 1301(9)(A), a House or Senate committee, *id.* § 1301(9)(B), or the Capitol Police Board, the Congressional Budget Office ("CBO"), and the Office of the Architect of the Capitol, *id.* § 1301(9)(D). Nothing in the statute purports to terminate an Employing Office or relieve it of liabilities incurred simply because a Member associated with it has left Congress. Indeed, in the context of a statutory scheme designed to teach Members of Congress about the benefits and burdens of their laws, Congress can hardly have contemplated that the right of a Senator's employee to pursue a CAA claim would disappear if the individual Senator left office, while an employee of the CBO, whose continuing existence is not dependent on the vagaries of election cycles, would never be at risk of losing the right to pursue his CAA claim. Thus, there is no provision for dissolution of an Employing Office, and the Judgment Fund remains independently responsible for any damages awarded, whether the Member remains in Congress or not.

The Employing Office attempts (Br. 17-18) to demonstrate its legal demise by arguing that it no longer has computer equipment, mailing capabilities, stationary, and a personal budget. This argument misses the point. While there may be provisions limiting its functions, there is no provision destroying the legal entity of the Employing Office, its responsibility for expenses and liabilities incurred prior to the Member leaving office (such as back pay), or its right to appropriations from the U.S. Treasury for defending against actions and paying damages. Thus, just as a corporation can continue to exist as a legal matter without an office building, employees, a budget, or even a business, *see City of Erie v.*

Pap's A.M., 529 U.S. 277, 288 (2000), so can and does the Employing Office.[2]

C. Adopting The Employing Office's Interpretation Of Mootness And Abatement Would Gut The CAA And Nullify The Protections Afforded Under It.

The construction of the CAA advocated by the Employing Office would render the Act's protections wholly illusory and defeat the goals of the CAA. Appellant's interpretation of the Act, for example, would free an employing office of responsibility for violations at the core of the CAA and leave the victim without the remedies that Congress provided, if a Member simply took the expedient step of resigning. Moreover, appellant's construction of the statute would essentially immunize the illegal acts of the employing office of any legislator who is not reelected to Congress, since (as this case demonstrates) the conduct of litigation (including all appeals) can easily take enough time to exhaust an entire term of a House member or a Senator. "[T]here is nothing to suggest that, in enacting [the CAA] . . . . Congress intended to hold out to [congressional employees] an illusory right for which it was denying them a remedy." *Graham v. B'hood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 240 (1949).

In addition, the Employing Office's interpretation of the CAA would nullify the protections afforded by the provisions of the Workers Adjustment and Retraining Notification ("WARN") Act and the Family Medical Leave Act

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[2] In a footnote (Br. 17 n.5), the Employing Office suggests that sovereign immunity requires strictly construing the CAA to limit the instances in which suits can be maintained. Congress, however, expressly waived sovereign immunity for actions brought pursuant to the CAA. *See* 2 U.S.C. § 1413. Nothing in section 1413 or elsewhere in the CAA provides that the waiver of sovereign immunity terminates when a legislator leaves office.

("FMLA") that were incorporated into the CAA. Under the WARN Act, "[n]o employing office shall be closed . . . until the end of a 60-day period after the employing office serves written notice of such prospective closing . . . to covered employees." 2 U.S.C. § 1315(a)(1). But if a Senator left office and the employing office did not timely issue a WARN notice, it would be impossible, as demonstrated in the penultimate paragraph of this section, for covered employees to vindicate their rights within 60 days even under the CAA's expedited procedure. Likewise, congressional employees do not become eligible for FMLA coverage until after they have "been employed in any employing office for 12 months." *Id.* § 1312(a)(2)(B). Under the Employing Office's view, if an individual is hired at the beginning of a one-term (or retiring) House Member's term and alleges an FMLA violation in the second year of the term, that employee will not be able to complete the grievance process related to his claim. This Court should not "accept [appellant's] interpretation of the statute . . . for it completely eviscerates the congressional goal of protecting" congressional employees in the workplace. *Bowsher v. Merck & Co.*, 460 U.S. 824, 836 (1983).

The Employing Office is wrong to argue (Br. 20) that the purpose of the CAA can be effectuated by the "expedited hearing procedures Congress provided to employees" through the Office of Compliance in 2 U.S.C. § 1405. Congress contemplated that employees would have a *choice* between initiating an action in federal district court and pursuing a claim through the Office of Compliance, *see* 2 U.S.C. § 1404, and appellant's argument eviscerates that right of choice.

Moreover, even under the supposedly "expedited" process managed by the Office of Compliance, an employee can expect to spend up to 375 days pursuing his claim, *not* including the additional time required for review by the Board of Directors of the Office of Compliance and/or the Federal Circuit and/or the Supreme Court, each of which may take an indeterminate period of time for its deliberations. *See id.*

§§ 1361(e), 1402(b), 1403(a), (c) (mandatory counseling and mediation periods shall each be 30 days long, with a 15-day wait between the two); *id.* § 1404 (following mediation, an employee has up to 90 days to elect to file a complaint with the Office of Compliance or in federal district court); *id.* § 1405(d)(2), (g) (if employee elects expedited process managed by the Office of Compliance, hearing may not begin for 90 days, and hearing officer has an additional 90 days to issue decision); *id.* § 1406(a) (employee may take 30 days to file a petition for review of adverse decision by hearing officer with the Board of Directors of the Office of Compliance). In short, including appellate review, this "expedited" process can take upwards of two years. *Cf.* Administrative Office of the U.S. Courts, *Judicial Caseload Profile Report*, Federal Court Management Statistics (2004) (national median for time from filing of notice of appeal to disposition of case is 10.5 months), *available at* http://www.uscourts.gov/cgi-bin/cmsa2004.pl (last visited March 30, 2007).

Thus, under appellant's interpretation, the Act would effectively immunize the employing office of any elected official who resigns or is not reelected from liability for acts committed in violation of the CAA during the legislator's last few years in Congress. A more self-defeating construction of the statute is difficult to imagine.

II. MEMBERS ARE NOT ENTITLED TO SPEECH OR DEBATE CLAUSE IMMUNITY FROM CAA CLAIMS.

The Employing Office's proposed construction of the Speech or Debate Clause is equally destructive of the CAA—and equally inappropriate The Employing Office argues that the Clause covers personnel decisions relating to employees "whose job duties are part of the due functioning of the legislative process." Br. 27. But that is not the proper standard under the Speech or Debate Clause; and, contrary to the Employing Office's argument, the Constitution does not

prevent Congress from holding itself to the same standards that it applies to private employers and the Executive Branch. Indeed, Congress took special care in designing the CAA to avoid implicating even the most robust elements of the speech and debate immunity. Any contrary interpretation of the Speech or Debate Clause would wrongly and unnecessarily eviscerate the CAA's noble purpose of improving the democratic function by ensuring that Members of Congress are not above their own laws.

A. The Speech Or Debate Clause Applies Only To "Legislative Acts" Of Members Or Their Aides.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST., ART. I, § 6, cl. 1. The Clause preserves the separation of powers by protecting members of the Legislative Branch from undue intimidation or harassment, including litigation, by the Executive Branch or a "hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966). *Accord Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975).

Since the Founding, the Clause has been understood to apply only to acts that are themselves an integral part of the legislative process. *See* Thomas Jefferson, *A Manual of Parliamentary Practice* (1800), *reprinted in* THE COMPLETE JEFFERSON 704 (S. Padover ed. 1943) (the privilege "is restrained to things done in the House in a Parliamentary course"). Specifically, this Court has held that only a "legislative act"—"an act generally done in Congress in relation to the business before it"—is immune from judicial review. *United States v. Brewster*, 408 U.S. 501, 512 (1972); *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 863, at 630 (5th ed. 1891) ("[T]his privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things beyond the place and limits of duty.").

Interpreting this text, this Court has held that the Clause provides immunity for acts of voting, statements made during committee proceedings, issuance of congressional subpoenas, preparation of committee reports, and communications with other Members. *See, e.g.*, *Brewster*, 408 U.S. at 512; *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973); *Eastland*, 421 U.S. at 505; *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). But the Court has emphasized that acts do not become "legislative in nature" merely because Members "generally perform [them] in their official capacity," *Gravel v. United States*, 408 U.S. 606, 625 (1972), and that the Clause "does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions." *Brewster*, 408 U.S. at 528. The Court has explained that:

> [l]egislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel, 408 U.S. at 625. Immunity is limited to acts "which [are] clearly a part of the legislative process." *Brewster*, 408 U.S. at 515-16.

This Court has also made it clear that, even when applicable to decisions or actions of Members or their aides, Speech or Debate Clause immunity does *not* run to other officials or entities in the Legislative Branch that are simply implementing or carrying out a Member's legislative act. *See, e.g.*, *Kilbourn*, 103 U.S. at 205 (execution of arrest warrant by Sergeant-at-Arms not protected from suit even though vote on resolution authorizing arrest was protected); *Powell*, 395 U.S. at 506 (Clerk and Doorkeeper implementing

protected resolution were not immune from suit); *cf. Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967) (alleged conspiracy including committee counsel not protected even though Member was protected).

B. An Employing Office's Personnel Actions Are Not Legislative Acts Of A Member Or Aide.

1. The Covered Personnel Actions Are Not The "Legislative Acts" Of A "Member" Or Aide Within The Meaning Of The Speech Or Debate Clause.

Personnel actions concerning Legislative Branch employees are not "legislative acts" and thus are not immune from suit under the Speech or Debate Clause. To be sure, "[e]mployment decisions can be quite important in facilitating the legislative process, but they simply are not part of it. Just like the gathering of documents for use in a congressional hearing, which the [Supreme] Court has said is outside the scope of the constitutional immunity, even the most important personnel decisions are simply a means of preparing for the legislative process." Nelson Lund, *Congressional Self-Exemption from the Employment Discrimination Laws: A Rational Choice Analysis of the Civil Rights Act of 1991*, 54 LA. L. REV. 1559, 1577 (1994). Indeed, personnel decisions are even more remote from the legislative process than gathering documents, for such decisions do not occur in or during the session of a legislative body; they do not impact legislation; and, they do not impact the public for which the legislative process exists. They are, rather, merely part of the process of managing an office. The fact that the management decision is made by a Member is irrelevant; "[t]hat Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. 625.

Review of personnel actions would not implicate the primary purpose of the Speech or Debate Clause—the

protection of the Legislative Branch from intimidation or harassment by a coordinate branch. Review would not "threaten the integrity or independence of the [Congress]," *id.*, because personnel decisions are not part of the legislative process itself. For this reason, the numerous academics who have addressed this precise question under the CAA have concluded that the Speech or Debate Clause does not preclude claims for unlawful personnel actions involving congressional employees, including employees with legislative duties. *See, e.g.*, James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. LEGIS. 1, 55 (1999); Lund, *supra*, at 1577; Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 136-37 (1994).

In addition, the CAA was specifically designed to avoid the risk of intimidation by providing that the challengeable personnel actions are not even the actions of the "Member" or a personal aide. That is, the CAA does not create any claims against Members or their aides. The CAA allows claims to be filed only against an "employing office" for its distinct employment actions. Specifically, under the CAA, the "employing office" is the legal entity that employs the employees of a congressional office, that takes official responsibility for implementing personnel actions, and that may be sued. *See* 2 U.S.C. §§ 1301(9), 1405(a). And, any damages awarded or settlements paid are funded by an account of the Department of the Treasury, not by the individual Member or even by the congressional office that the Member runs. *See id.* § 1415(a). In short, neither Members nor their aides are viewed for these purposes as having implemented covered personnel actions or as being subject to suit.

This design was purposeful. The CAA created the "employing office" so that it could play this separate role and

avoid any Speech or Debate Clause questions whatsoever. *See* 141 Cong. Rec. S444 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley); *id.* at S452 (statement of Sen. Lieberman). The Employing Office's contrary argument simply fails to recognize that "the CAA shields members themselves from litigation even while making Congress accountable as an institution." Brudney, *supra* at 10.

In sum, in light of the careful design of the CAA, there is no fair argument that the Speech or Debate Clause applies to claims under it. Speech or Debate Clause precedent clearly distinguishes between "legislative acts" of Members (or their aides) and separate acts by others. In *Powell*, for example, Members of the House illegally voted to exclude Powell, and House aides—the Clerk and the Doorkeeper—implemented the invalid resolutions. The Members were dismissed, but the case proceeded against the legislative agents who implemented the Members' decision. *See* 395 U.S. at 506. Similarly, in *Kilbourn*, the Members who voted for a congressional witness's arrest were protected from suit, but the Sergeant of Arms who executed the congressional order was liable for damages for the unlawful arrest. *See* 103 U.S. at 204-05. These cases "reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive [or judicial] control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." *Gravel*, 408 U.S. at 620. The CAA's careful design easily puts to rest any claim that recognition of such a privilege is necessary here. Not only are "legislative acts" not an issue, but the CAA makes a separate entity—not the Member or an aide—legally responsible for the actions that it covers, thus placing the CAA outside of the reach of the Speech or Debate Clause.

Because a decision is separate from its implementation under Speech or Debate Clause jurisprudence, appellant is wrong to suggest (Br. 43) that suing the employing office is

no different than suing the Member or a personal aide. As Judge Brown concluded in her concurring opinion below, "Congress intended to subject the *legislative branch* to liability for violation of federal employment laws, not to subject its members personally to such liability." Juris. Statement 49a (emphasis in original). "[T]he 'employing office' is nothing like a member's aide, who can invoke the Speech or Debate Clause privilege on the member's behalf." *Id.* at 50a. "Most accurately put, the 'employing office' is an administrative division within Congress, designated to be named as the defendant in these actions. Nothing in that status suggests that an employing office can invoke a member's Speech or Debate Clause rights." *Id.* at 51a.

2. All Available Interpretive Evidence Confirms This Construction Of The Speech Or Debate Clause.

All of the sources that this Court might consult to determine the scope of constitutional immunities confirm that the personnel actions of an "employing office" are not within the scope of the Speech or Debate Clause.

First, this Court's decisions interpreting other, analogous common law immunities make clear that administrative decisions like those at issue here are not the kinds of acts made immune by the Clause. This Court has repeatedly "equated" speech and debate immunity with common-law immunity (relying on precedent concerning one to interpret the other). *See Sup. Ct. of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 733 (1980); *see also Eastland*, 421 U.S. at 506-07; *Dombrowski*, 387 U.S. at 85; *Johnson*, 383 U.S. at 179-80. In the context of these common law immunities, it is well settled that employment actions are administrative acts *not* entitled to immunity.

In *Forrester v. White*, 484 U.S. 219 (1988), for example, this Court held that a judge's absolute immunity from suit for performance of judicial functions did not extend to a decision

to fire a probation officer, although the officer's duties were "inextricably tied to discretionary decisions that have consistently been considered judicial acts," *id.* at 222 (internal quotation marks omitted), and "essential to the very functioning of the courts." *Id.* at 228. This Court ruled that terminating the officer was neither a "[J]udicial [n]or adjudicative" act, and thus was not immunized. *Id.* at 229.

In so ruling, this Court emphasized that it was "the nature of the function performed, not the identity of the actor who performed it, that informed [its] immunity analysis." *Id.* Further, the Court held that its precedents revealed "an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform," *id.* at 227. Although the judge's acts "may have been quite important in providing the necessary conditions of a sound adjudicative system," they "were not themselves judicial or adjudicative" but administrative and were not immune. *Id.* at 229. *See also Gross v. Winter*, 876 F.2d 165, 172 (D.C. Cir. 1989) ("[T]he functions judges and legislators exercise in making personnel decisions affecting such employees are administrative, not judicial or legislative."). "[T]he import of [*Forrester*] extends beyond state-court judges and probation officers," because the "holding was informed by a common theme [that this Court] discerned in its immunity precedents," *id.* at 171 (citing *Forrester*, 484 U.S. at 228)—to wit, that the function that judges and legislators exercise in making personnel decisions affecting such employees is administrative, not judicial or legislative. *See also id.* at 172.

Second, *Forrester*'s holding that personnel actions are administrative in nature, and not properly subject to immunity, has been endorsed by the coordinate branches of government. In *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), the United States took the position that, "[i]n light of recent Supreme Court precedent [*Forrester*], we submit that personnel decisions are never protected by the

Speech or Debate Clause." *See* Br. of the United States at 16, *Rostenkowski* (Nos. 94-3158, 94-3160) (Jan. 23, 1995), *available at* 1995 WL 17204072.

In debates over the CAA, Congress built upon earlier constitutional deliberations and similarly concluded that Speech or Debate Clause immunity does not attach to congressional personnel actions. For example, Representative Goodling included in the record a 1991 Congressional Research Service Report, explaining that *Forrester* strongly suggested that the Speech or Debate Clause would not bar a suit because "hiring and firing practices are not legislative within the meaning of the clause." 141 Cong. Rec. H252-01, H265 (daily ed. Jan. 17, 1995). Senator Lieberman similarly noted that:

> an illegal employment action would not be regarded by the courts as an act that is "legislative in nature" . . . . [T]his is just common sense that the speech-and-debate clause on its face would not seem to be a clause that would make us immune from the impact of the laws we adopt and impose on all other employers when we are acting as employers instead of as Members of the Congress involved in legislation.

141 Cong. Rec. S693-02, S701-02 (daily ed. Jan. 10, 1995). *See also* 141 Cong. Rec. S621-02, S639-40 (daily ed. Jan. 9, 1995) (statement of Sen. Grassley) ("If Members heard during the previous speeches that *Browning* [*v. Clerk, U.S. House of Reps.*, 789 F.2d 923 (D.C. Cir. 1986)] may [a]ffect what we can do here on congressional coverage to protect our employees because they might be an extension of our legislative duties, under the speech and debate clause, you should observe that the Supreme Court, 2 years later, in 1988, issued an opinion [*Forrester*] that requires *Browning* to be revisited.").

Third, those courts of appeals that have considered the issue have uniformly concluded that the Speech or Debate Clause

does not apply. In *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004), *cert. denied*, 127 S. Ct. 975 (2007), the Tenth Circuit held that the Speech or Debate Clause does not bar an action under the CAA, noting that the Clause "should not be, and has not been, read to make members of Congress into a special class of citizens protected from suit (or prosecution) arising out of any activity that could assist in the performance of their official duties," *id.* at 1306-07, and that a "personnel decision is not a 'legislative act,' as defined by the Supreme Court." *Id.* at 1318. Similarly, in the decision below, the D.C. Circuit held that the personnel decisions at issue were not legislative acts subject to Speech or Debate immunity because liability was not predicated on an inquiry into "how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee" in order to make out a violation of the CAA. Juris. Statement 13a (internal quotation marks and citation omitted).

3. The Employing Office's Contrary Arguments Are Wrong.

In arguing for immunity, the Employing Office relies primarily on the test adopted in the D.C. Circuit's earlier, now repudiated, decision in *Browning* and, in particular, on the view that immunity applies where the *duties* of the employee (against whom the employer's action is taken) are part of the due functioning of the legislative process. *See* Br. 29 n.8 (characterizing its test as "a minor modification of the test articulated in *Browning*"). But, in determining the nature of a personnel action (as "judicial" or "administrative"), *Forrester* accords no weight to the employee's duties, even though as a practical matter, they may be essential to the functioning of the institution in question. *See Forrester*, 484 U.S. at 228. And this Court's speech and debate immunity jurisprudence makes clear that the pertinent inquiry is whether the action challenged is a "legislative act," not whether the employer's

action is taken with respect to an employee who performs legislative duties.

Indeed, the bizarre implication of appellant's view of the Speech or Debate Clause—an implication that the Employing Office itself identifies—demonstrates that its interpretation is untenable. The Employing Office admits that in its view, while unlawful termination claims *are* barred by the Speech or Debate Clause, CAA claims based on a hostile work environment are *not*. The Employing Office reasons that "[g]roping employees and telling lewd jokes are not legislative acts." Br. 31. Yet, on appellant's logic, *terminating* an employee for complaining about the groping or refusing to have sex with the Member *is* a legislative act. This logic is perplexing at best: just as soliciting sexual favors from an employee is not a legislative act, terminating the employee for refusing to grant the sexual favor is not a legislative act.

Equally indefensible is the implication of the Employing Office's view of speech and debate immunity on Hanson's claim for overtime pay in connection with his work on a "Health Care Help Line," which assisted people having difficulties with their insurance carriers or HMOs. Juris. Statement 7a. In the Employing Office's view (*see* Br. 40) the overtime claim is barred because Hanson had *some* job duties that were part of the due functioning of the legislative process. Paying overtime wages, however, cannot be understood as part of the legislative function, and here, even the underlying work with constituents giving rise to Hanson's particular overtime claim was unrelated to the legislative process. There is no authority supporting an interpretation of the Speech or Debate Clause that would bar this claim.

In addition, the Employing Office relies heavily and inaptly on *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In *Nixon*, this Court held that, due to "the special nature of the President's constitutional office and function[]," he has absolute immunity from common law liabilities for executive acts

performed within the "'outer perimeter' of his official responsibility." *Id.* at 756. The Court reasoned that the President has sole responsibility for the Executive Branch and that administration of the Executive Branch is "a task for which imperative reasons require an unrestricted power in the President to remove the most important of his subordinates in their most important duties." *Id.* at 750 (internal quotation marks and alternations omitted).

Relevant here, the Court in *Nixon* had no occasion to address whether and in what circumstances (if any) the President might have immunity from express statutory claims (like those the CAA creates). Moreover, the Court did not address the reach of the Speech or Debate Clause, which had been authoritatively limited to "legislative acts." *See also id.* at 762 (Burger, C.J., concurring). Furthermore, *Nixon* dealt with the unique institution of the presidency, with its responsibility for all administrative acts in the Executive Branch. The case thus neither calls into question the proposition that personnel actions are "administrative" acts nor determines whether the hundreds of members of Congress (in contrast to the single President) require immunity from statutory (as opposed to common law) liability for personnel actions in order to perform their distinct legislative functions. *Nixon* simply has no proper application to the question presented here.

Finally, the Employing Office contends (Br. 30-32) that allowing judicial review of claims for allegedly unlawful personnel actions would unduly interfere with the legislative process. This contention is unsound.

As this Court has explained, "even quite burdensome interactions" between the judiciary and another branch of government do not "necessarily rise to the level of constitutionally forbidden impairment of the [Branch's] ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. 681, 702 (1997). Rather, judicial review unduly intrudes on another branch only when the court

"is being asked to perform any function" of the other branch. *Id.* at 701.

Given the design of the CAA, actions under it have no potential to usurp legislative authority. Under the CAA, Members remain free to perform legislative functions without judicial interference: they may vote on legislation, propose legislation, hold hearings, and participate in the legislative process. Indeed, a Member cannot be restrained from these functions by virtue of CAA litigation, because a Member *cannot be* a party to a CAA action. 2 U.S.C. §§ 1405(a), 1408(b). The CAA also guarantees that no Member will fear a large damage award, as the CAA prohibits awards of punitive damages, and all damages are paid by a Treasury account. *Id.* §§ 1361(c), 1415(a).

Appellant's specific contention (Br. 29) that the CAA permits undue interference by allowing reinstatement as a remedy for discrimination claims is erroneous. Of course, the potential reinstatement remedy is entirely speculative at this point; and its mere existence would not itself justify barring a suit entirely. In any event, appellant's contention rests on the false assumption that personnel decisions, particularly discriminatory ones, are part of the integral functioning of the legislative business of Congress. If this Court determines otherwise, reinstating a congressional employee, like firing the employee, will not amount to performing a legislative act. In addition, the fact that employees may be reinstated does not mean that a Member must retain those employees without regard to other factors. It does not violate the CAA to consider party affiliation, domicile or political compatibility with the employing office, qualifications, or performance when hiring and firing congressional employees. *See* 2 U.S.C. § 1432(a).

In addition, this Court's decision in *Forrester* answers the concern that "the threat of vexatious lawsuits by disgruntled ex-employees could interfere with the quality of a judge's decisions," 484 U.S. at 229. In *Forrester*, the Court declined

to act on this concern because "it in no way serves to distinguish judges from other public officials who hire and fire subordinates." *Id.* at 229-30. The Court explained:

> Absolute immunity. . . is "strong medicine, justified only when the danger of [officials being] deflect[ed from the effective performance of their duties] is very great." The danger here is not great enough.

Id. at 230 (alterations in original) (citation omitted). The same is surely true with respect to CAA claims asserted against an employing office.

Finally, the Employing Office's argument concerning undue interference ignores Congress's judgment that "Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch." 141 Cong. Rec. H90-02, H94 (daily ed. Jan. 4, 1995) (statement of Rep. Shays); *see also* 141 Cong. Rec. S452 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman). On this point, the constitutional framers agreed. Thomas Jefferson opined, for example, that the Speech or Debate Clause was worded narrowly so that Congress could be held to its own laws:

> It was probably from [their] view of the encroaching character of privilege, that the framers of our Constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged 'Senators and Representatives' themselves from . . . being questioned in any other place for any speech or debate in either House.

Jefferson, *supra*, at 702. And, James Madison concurred. *See* THE FEDERALIST No. 57, at 352 (James Madison) (Clinton Rossiter ed. 1961) ("[T]hey can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society."). The

Employing Office's contrary, self-serving argument flies in the face of this history.

C. Contrary To The Employing Office's Alternative Argument, The Speech Or Debate Clause Does Not Prohibit Inquiry Into Hiring And Firing Decisions.

Seeking to build upon the unsound *dicta* in Judge Randolph's plurality opinion below, the Employing Office argues in the alternative (Br. 32) that the Speech or Debate Clause "preclude[s] *adjudication* of a CAA case if the challenged personnel action was related to an employee's performance of those job duties that are legislative acts." (emphasis added). Specifically, like Judge Randolph, the Employing Office argues that in CAA suits a Member must "submit an affidavit" describing the legislative functions the former employee performed poorly, *id.* at 33, and like Judge Randolph, concludes that the potential for such testimony requires dismissal of this suit. It was inappropriate for Judge Randolph to address this argument, as no testimonial privilege has been raised or could be raised at this point in the litigation. *See* Juris. Statement 29a (Rogers, J., concurring) ("Because these are appeals of denials of motions to dismiss under Federal Rule of Civil Procedure 12(b)(1), the court need not address what happens when legislative acts are evidence in varying contexts in CAA litigation."); *United States v. Myers*, 635 F.2d 932, 942 (2d Cir. 1980) ("[w]hether the appellant will choose to offer evidence of his own legislative acts is, at this point, a matter of speculation"). In all events, the Employing Office's argument, and the *dicta* below, is erroneous.

This Court's cases establish not only an absolute immunity from suit under the Speech or Debate Clause but also a testimonial privilege that "protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts." *Brewster*, 408 U.S. at 509. Thus, in *Johnson*, 383 U.S. 169, the Court held that, where the

underlying act alleged to be unlawful is *itself* a legislative act, the Clause prohibits evidence about the legislative act or a Member's involuntary compulsion to testify about legislative acts. *Id.* at 184-85. But, the Court has made clear that "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." *Brewster*, 408 U.S. at 512.

These precedents mean that "members of Congress are privileged against the evidentiary use against them of any legislative act." *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 n.5 (D.C. Cir. 1995). But, the precedents do not prohibit lawsuits simply where there is a possibility that a Member may decide to offer evidence of legislative acts as part of a defense, particularly where the suit is not based on the unlawfulness of a legislative act. As the Second Circuit has explained,

> The protection against being "questioned" outside of Congress prevents the use of legislative acts against a Member. It does not prevent him from offering such acts in his own defense, even though he thereby subjects himself to cross-examination.

Myers, 635 F.2d at 942.

Thus, as now-Justice Alito explained in an opinion for the Third Circuit, the testimonial privilege of the Speech or Debate Clause merely prohibits "*for[cing]* [a Member] to refute charges that directly implicate legitimate legislative acts." *United States v. McDade*, 28 F.3d 283, 294, 295 n.14 (3d Cir. 1994) (emphasis in original). It does not prohibit a Member from "choos[ing] to offer rebuttal evidence of legislative acts." *Id. See also Rostenkowski*, 59 F.3d at 1303 ("[W]e agree with the Second and Third Circuits that the constitutional protection against his being questioned for his legislative acts does not prevent a Member of Congress from offering such acts in his own defense, even though he thereby

subjects himself to cross-examination.") (internal quotation marks and citation omitted).

In light of the limited scope of the testimonial privilege, both Judge Randolph and the Employing Office are wrong to suggest that the testimonial privilege is implicated here. Questioning a Member about his or her explanation for terminating or disciplining an employee—*i.e.*, questioning the Member about whether and how the employee did a poor job of executing job duties related to legislative acts—simply is not the same thing as questioning a Member about those legislative acts. The questioning does not require a Member to answer for or about a legislative act. It simply elicits information about a personnel action—an administrative act. In addition, if the Member chooses to raise legislative acts as a defense, that would not operate to bar testimony about the acts. To be sure, the Speech or Debate Clause prevents those outside of Congress from using legislative acts against a Member or forcing a Member to testify *involuntarily* about legislative acts, but it does not prevent the Member from offering such acts as part of his or her defense *even though the Member thereby subjects himself to cross-examination.*

In all events, assertion of a testimonial privilege would not require dismissal of this suit. The testimonial component of the Speech or Debate Clause is an *evidentiary* privilege that permits Members to refuse to answer certain questions and bars the introduction of evidence of a legislative act where it is being used to demonstrate the unlawfulness of the act. 26A CHARLES A. WRIGHT *et al.*, FED. PRAC. & PROC. EVIDENCE § 5675 (1992); RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW § 8.8 (7th ed. 2004). But this Court has never suggested that the baby must be thrown out with the bath water. Rather, it has recognized that the testimonial privilege can be preserved without barring an entire suit about a non-legislative, personnel action. *See Johnson*, 383 U.S. at 172, 177 (holding that even though Member of Congress was not immune from suit, he could

assert privilege and refuse to answer specific questions); *see also Brewster*, 408 U.S. at 528 (observing that *Johnson* held certain evidence inadmissible but allowed conviction if "no showing of legislative act is required").

D. Any Doubt Should Be Resolved By The Strong Presumption That The CAA Is Constitutional.

Any doubt about the proper application of the Speech or Debate Clause—as to either its immunity or testimonial privilege—should be resolved against the Employing Office. The Employing Office seeks to use the Speech or Debate Clause to have the CAA held unconstitutional as applied. But the CAA, like all federal statutes, is entitled to a strong presumption of constitutionality. *See Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("Congress is a coequal branch of government whose Members take the same oath [judges] do to uphold the Constitution."). Moreover, where Congress has specifically considered the question of a statute's constitutionality, "[t]he rational and practical force of the presumption [that a law is constitutional] is at its maximum." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953). That is the case here.

Time and again—in connection with the Civil Rights Act of 1991, 2 U.S.C. §§ 601 *et seq.*, the Report of the bipartisan Joint Committee on the Organization of Congress, a congressional accountability bill introduced in the 103rd Congress, and the enactment of the CAA—Congress has expressed its view that the Speech or Debate Clause does not prevent regulation of congressional employment actions.[3]

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[3] *See* 136 Cong. Rec. S9339-02, S9372 (daily ed. July 10, 1990) (rejecting point of order concerning constitutionality of judicial review of Senate employment decisions); H.R. Rep. No. 103-413, at 133-34 (1993) (observing that *Forrester* strongly suggests that Members have no immunity for employment decisions, and the D.C. Circuit should reconsider its contrary case law); 140 Cong. Rec. H7339 (daily ed. Aug. 10, 1994) (statement of Rep. Swett) (CAA addressed all constitutional

That considered judgment by a coordinate branch may be displaced only by an unambiguous constitutional command that is not present here.

This presumption of constitutionality is uniquely appropriate here. Speech or Debate Clause protection is typically invoked when a member of the public or an Executive Branch prosecutor seeks to hale a legislator into court. In the context of the CAA, however, Congress is policing itself, and the Constitution confers broad discretion on each House to determine its own rules of conduct for Members. *See* U.S. CONST. ART. I, § 5. To apply Speech or Debate Clause immunity to CAA claims would be to wrongly "force upon Congress an immunity that Congress itself does not believe is needed to protect its own independence." Lund, *supra*, at 1583. It would prevent Congress from imposing on itself the laws that it has imposed on the Executive Branch and the public at large. Nothing in the text or history of the Speech or Debate Clause supports such an unnatural effort, as the Framers themselves argued that Congress *should* be subject to its own laws and that the Speech or Debate Clause would not operate to prevent it. *See supra* pp. 13-14.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be affirmed.

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concerns); *id.* at H7344 (statement of Rep. Rose) (CAA did not run afoul of Constitution); *id.* at H7351 (statement of Rep. Sanders) (same); H.R. Rep. No. 103-650, at 1, 3 (1994) (same).

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